IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. STEVEN KELLY FRAZE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2722 Cheryl Blackburn, Judge

No. M2005-01213-CCA-R3-CD - Filed March 13, 2006

The Defendant, Steven Kelly Fraze, pled guilty to one count of rape and one count of child neglect in exchange for an effective sentence of eight years, seven of which would be served on probation. Subsequently, a probation violation warrant was issued, and, after a hearing, the trial court revoked the Defendant's probation. The Defendant appeals, acknowledging that he violated his probation but contending that the trial court abused its discretion when it ordered him to serve the balance of his original sentence. Finding no reversible error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jeffrey A. DeVasher, Nashville, Tennessee (on appeal), and C. Dawn Deaner, Nashville, Tennessee (at trial), for the appellant, Steven Kelly Fraze.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the Defendant's alleged violation of his probation from his sentence for crimes to which he pled guilty on February 19, 2004. At the hearing on the Defendant's guilty plea, the State said that, had the case gone to trial, the facts would prove that:

> [O]n October 17th of 2001 [the Defendant] walked himself into a police station and proceeded to tell Detective Potter that he needed to get something off of his chest. [The Defendant] then admitted that over a period of time . . . he would baby-sit [D.D.], who was . . . [eight months to one year old] child who [the

> Defendant] knew through the victim's family. He baby-sat that child at the Dodson residence located here in Nashville, Davidson County and on one occasion at the [D]efendant's apartment in the Oak Hill Apartment Complex, also located here . . . in Nashville, Davidson County.
>
> The [D]efendant acknowledged that on multiple occasions he would have sexual contact with [D.D.] initially involving the [D]efendant having [D.D.] masturbate him and then proceeding on later occasions to hav[e] the victim perform oral sex on him. That is the basis for the rape allegation.
>
> The [D]efendant also provided information that during the time that this was going on he was using drugs including marijuana and Paxil and that on occasions he would smoke marijuana in the child's presence, that being the basis for the neglect count of the indictment.
>
> On one of those occasions the victim's mother came . . . back to pick up her son and noticed the odor of marijuana at the [D]efendant's apartment.
>
> There was no other corroborating information with respect to the confessions made by the [D]efendant other than his admissions to several other church members who he also confessed to and encouraged him to go to the police . . . .

Prior to accepting the Defendant's guilty plea, the trial court told the Defendant:

> [I]n the future because you're waiving your right to appeal the actual conviction and the sentence . . . if . . . after you get out . . . you violate your probation, the only thing that I'm going to be hearing about is whether or not you actually have to serve your sentence.
>
> Now, if I were to determine that you had to and it was in the Department of Corrections, you could appeal that determination but not the length of the sentence and not the actual conviction.

The trial court accepted the Defendant's guilty plea and found him guilty of rape, a lesser-included offense of child rape. The trial court stated:

> It's a B felony, eight-year sentence as a Range 1 violent offender. It's a Range 1 offense, but it's a violent offense. You have to serve eight years, but I'm suspending all but one year day for day at a hundred percent. . . . [Y]ou'll be on probation for twelve years. As part of that, obviously, you're going to have to have sex offender treatment, you're going to be on the sex offender registry, you will have lifetime supervision even after the twelve years is over with, drug and alcohol assessment, stay away from the victim or the victim's family.

The trial court also accepted the Defendant's plea of guilty to child neglect and ordered a two-year concurrent sentence for that offense.

On February 18, 2005, after the Defendant was released on probation, a probation violation warrant was issued against him. At the hearing on this warrant, the following evidence was presented: Juanita Eileen Gamache testified that she is a licensed professional counselor who works with sex offenders, their families, and their victims. She said that the Defendant was attending a sex offender treatment program regularly from approximately October until he was discharged in January or February. Gamache testified that the treatment program required its participants to complete homework assignments, but the Defendant did not complete his assignments. Additionally, as part of the program, the counselors give the participants behavioral intervention techniques, and according to Gamache the Defendant did not use these techniques or follow through with them.

Gamache testified that a determination was made to remove the Defendant from treatment based upon four circumstances. The first circumstance presented itself when Gamache gave a homework assignment for the treatment program that required the Defendant to describe his fantasies and his behaviors. One of the things that the Defendant said was that he was in a situation where he had come across a small child who was alone in a restaurant bathroom and had sexual thoughts about the child. Gamache asked the Defendant about behavioral interventions that she had given him, including an ammonia capsule that is designed to produce a very foul smell when cracked open by a participant and acts as an "adversive" therapy. The Defendant said that he had not used the ammonia capsule, which was in his pocket when he encountered the child. Gamache asked about a second behavioral intervention, which was an approved chaperone, and the Defendant said that he had not told his mother, who was his approved chaperone, about the encounter. Gamache testified that the Defendant did not offer any explanation about why he did not employ the behavioral interventions available to him.

The second circumstance that led to the Defendant's termination from the program was his admission in a homework assignment that he had visited an adult bookstore and had purchased a pornographic magazine. Gamache testified that, during treatment, counselors constantly go over the "rules and orders," the sexual offender directives, telling the participants the places they can and cannot go based upon what is written in the directives. This is to help the participants avoid high-risk situations. Gamache testified that the rules and orders state that the participants are not to purchase anything, view anything, or listen to anything that potentially could increase their arousal and put them into a sexual offending cycle so that they become a risk not only to themselves but also to the community. Gamache further stated that, the prohibition of possession of pornographic materials and avoiding places where such materials are sold is a rule or condition of probation.

The third circumstance that led to the Defendant's termination from treatment was that he failed a drug screen. On February 5, 2005, the Defendant completed a homework assignment in which he admitted that he failed a drug screen. Gamache agreed that, at the time, she was unaware that the Defendant had committed his child related offense while under the influence of marijuana. She testified that had she been aware of this, his failing the drug test would have

raised a "[h]uge red flag." Gamache agreed that she reported this activity to the Defendant's probation officer.

The final circumstance that led to the Defendant's termination was that he reported that he accepted employment in a place where he knew that he was going to be very close to where children were. Gamache said that she told the treatment participants to keep a very long distance away from day care facilities and schools for the sake of themselves and for the community. When Gamache confronted the Defendant about this, he said he "just took the job. And said he knew specifically that he was going to be near where there were a lot of children . . . in a school setting."

Gamache testified that she saw a decline in the Defendant's progress in treatment. His behaviors "were becoming more risky the [longer] . . . that he had been in treatment." Gamache said that she warned the Defendant about the potential consequences of his violating the conditions and suggested that he comply with the behaviors unless he wanted to go to jail. Gamache said that she did not think that the Defendant was an appropriate candidate for the outpatient treatment that they offered.

On cross-examination, Gamache said that she has been a counselor for approximately one year. She agreed that she only learned of the Defendant's encounter with the child in the restroom because of his self reporting. The Defendant told her that he went into the restroom, saw the child, and stayed in the restroom for a second or two. Gamache testified that when they discussed this further, though, the time he had spent in the restroom with the child got longer, up to ten seconds. Gamache stated that the Defendant did not indicate that he talked to the child, and he walked out of the restroom without having any contact with the child. Gamache agreed that, since October 9, 2004, when the Defendant started treatment, he attended all groups required. She agreed that, again, she only learned of the bookstore incident and the drug screen because the Defendant wrote about these situations in his homework. Gamache testified that the Defendant wrote that he had been feeling depressed about his life, which was why he bought the pornographic magazine. Gamache said that it was progress that the Defendant told her his activities that did not comply, but he was still responsible for not complying with the rules of probation. Further, she said that he reported that he was working with his father doing flooring at different job sites.

Joyce Johnson testified that she is the Defendant's probation officer, and she began supervising his probation in September of 2004. Johnson agreed that, as part of his probation, the Defendant was in treatment, and she attended some of the treatment sessions. Johnson asked the court to sign a probation violation warrant on February 18, 2005, in part, because when she went to check on the Defendant at his residence she found some magazines that she did not think the Defendant should have in his possession. After finding these magazines, she asked the Defendant if there was anything else that she should know about, and he said, "No, there's nothing else." She then found, hidden in his closet, an adult pornographic magazine that was "very explicit." Johnson talked to the Defendant at length about the magazines, and he said that he "was feeling bad, and he just wanted to feel good." Johnson testified that the Defendant told her that he got the magazine at an adult bookstore and that he was only in the store for "just a

second." Johnson stated that the Defendant did not report to his treatment counselor that he had gone to the bookstore until Johnson found his magazines. Johnson testified that one of the conditions of the Defendant's release is that he not possess pornographic materials or be in a place that sells such materials.

Johnson testified that the Defendant failed a drug screen in January, but further testing at a lab yielded a negative result for the screen. Johnson explained that this was, therefore, not listed on the probation violation warrant.

On cross-examination, Johnson testified that, since she began supervising him, the Defendant has reported to her as required, he has maintained employment, and he has performed his required polygraph examinations. Additionally, Johnson reported that the Defendant obtained a drug and alcohol assessment and that he had attended NA or AA meetings. Johnson agreed that the Defendant lived with his mother and father and that the three were the only ones who lived in the home. Johnson said that the first magazines she found in the Defendant's room were Maxims, and he had a whole collection of these magazines. Johnson found these magazines inappropriate, but she did not characterize them as pornography. Further, she found children's books and told the Defendant that he needed to get rid of those books. Johnson testified that, after she found the pornographic magazine, she spoke with the Defendant's mother about it, and the Defendant's mother seemed upset. Johnson recalled that the Defendant's mother had taken the class required so that she could be an approved chaperone of a sex offender. Johnson said that, at the treatment session in which the Defendant was terminated from further treatment, she and the Defendant discussed that prior to being caught the Defendant had failed to disclose certain behaviors.

Katherine Sherrod, Ph.D., testified that she is a clinical psychologist, who has been through sex offender treatment training, and the Defendant was referred to her for therapy following a drug and alcohol assessment. She said that, when the Defendant was referred to her, he called and set up an appointment with her and has been coming to see her since January 11, 2005. The Defendant comes to see her approximately twice per month, and he pays for the expenses himself. Dr. Sherrod said that the Defendant told her that, if he had more money, he would come to see her more often. The doctor said that the Defendant seemed willing to talk about his issues, concerns, and frustrations, and she described him as cooperative with treatment.

Dr. Sherrod recalled that the Defendant told her that he had been sexually abused since he was twelve, and, in her experience, children who are sexually abused frequently have difficulty recognizing standard sexual boundaries without being retaught. The doctor said that the Defendant discussed with her that he purchased a pornographic magazine, and she was aware that this was a violation of his probation. She said that the Defendant's purchase of that magazine does not mitigate against him benefitting from treatment, and, in fact, could become part of the treatment. Further, the doctor said that the fact that this occurred early in his probationary period at a time when he has not fully learned what he needs to do and what he needs not to do is "relevant." She said that when you are working with a patient that is trying to get past an addiction it is not unexpected for the patient to show some minor inappropriate behavior that needs to become part of the treatment to help the patient establish better, firmer

boundaries. She continued that if a patient were to be found repeatedly with pornography it would mitigate against his benefitting from treatment because he is not learning from his mistakes. The doctor considered the Defendant a good candidate for rehabilitation, in part, because he was straightforward and willing to listen to her perspective.

Dr. Sherrod said that the Defendant told her about his deviant thoughts, and she thought that this was a very positive sign in his treatment. The Defendant also told her about working on a job at his aunt's house, which was near a school. He said that he drove straight to his aunt's house and never stopped to talk to any of the children on the way. He felt that he had followed the intention of his restrictions even if he had not followed the restrictions precisely. Dr. Sherrod discussed with the Defendant the necessity of him following the letter and the intention of the restrictions.

Dr. Sherrod said that, if the Defendant remained on probation, she was willing to continue working as his therapist. Further, she said that he should enroll in a different sex offender treatment program and go to sexaholics anonymous, which he had already started attending. She said that she was aware that he was also attending some AA and NA programs.

On cross-examination, the doctor said that the Defendant was referred to her to receive life therapy for his abuse as a child. She said that she was aware of the circumstances of the offenses to which he pled guilty, and she was aware that, after being on probation, he had sexual thoughts about a minor child in a men's restroom. She said that the Defendant did not approach or speak to the child and the child left the restroom. Dr. Sherrod said that the Defendant is quite different from her other patients because he does not suppress his inappropriate thoughts and he correctly thinks that sharing them is part of his treatment. She said that this has gotten him into trouble but it is important not to use against him that he admits having some negative thoughts. She conceded that the Defendant did not tell his mother about these thoughts, even though that was one of the tools available to him.

Doctor Sherrod testified that, with continued therapy, the Defendant would do better and understand what the boundaries are. Upon the trial court's questioning, the doctor said that the Defendant thought that looking at a magazine was not as serious as violating a person. Dr. Sherrod opined that the Defendant had failed to understand that he needed to follow every single aspect of his probation, a point which the doctor felt that he has finally comprehended.

The Defendant testified, and he admitted that he went to a pornographic store and bought a magazine knowing that doing so was a violation of his probation. He said that he was depressed at the time and "stressed" about all the rules and terms of his probation. He said that he understood that it was wrong and that he should not have bought the magazine. The Defendant agreed that, other than this occurrence, he has been complying with the other conditions of his probation by living with his parents, attending all of his treatment classes, undergoing a polygraph, and getting a drug and alcohol assessment. The Defendant stated that he had also followed all of the recommendations in the drug and alcohol assessment, as evidenced by a letter written on his behalf.

The Defendant explained his taking a job at his aunt's house, saying that he took the job before he knew that it was located near two schools, and he did not think that driving by a school was "high risk behavior." The Defendant recalled that there was only one way to get into and out of his aunt's neighborhood and that was to drive by three schools that are within one mile of each other. He said that his aunt's house was actually two or three miles from the last school. The Defendant said that, in treatment, they discussed incidental contact with children, such as contact that occurred at a grocery store. He said that he simply reported to Gamache that he recognized that this was incidental contact because he saw the children leaving school one day.

The Defendant expressed his desire to complete a sex offender treatment program and his willingness to submit to house arrest. The Defendant said that he understood that purchasing the magazine was wrong and reiterated that he did so because he was depressed. He said that Dr. Sherrod suggested medication for depression and that he attend sexaholics anonymous, which he had done.

On cross-examination, the Defendant agreed that he violated the rules of his probation, and he understood that those rules were set up to help him avoid situations that would place him at an increased risk to re-offend. The Defendant explained that, when he went into the restroom and saw a young boy, a few seconds later he left the restroom until the boy finished, and then he went into the restroom. He said that he did not have any deviant thoughts until afterward when he was reflecting back on the situation. He explained that this incident occurred on a Friday, and that he brought up the incident in a group therapy session the following day. He told his mother about the incident after his group session. The Defendant said that it was ten days between when he visited the bookstore and when he told his mother about the magazine. He admitted that he lied to his probation officer on the day that she searched his room.

The Defendant agreed that he understood that all the terms of his probation were important, and he knew that if he violated those terms he could go back to jail for seven years. The Defendant said that he wants to continue treatment and get better. The Defendant said that, in his group sessions, other patients mentioned that they had looked at pornography but did not get their probation revoked.

Based upon this evidence, the trial court found:

> I'm familiar with this case for lots of reasons. One of which is we had bond hearings, the facts about the baby-sitting, the fact that he turned himself in, the fact that this child was two-years old. And it involved a very serious -- it involved rape of a child, the allegations. And, I mean, he admitted to that, that he had the little two-year old suck his penis. For no other way of saying it that's exactly what he said.
>
> I'm sure there were some unusual circumstances with regard to this case, most likely the age of the victim and the lack of corroboration given. And that was one of your motions [defense attorney] as to why this case was settled in the manner it was settled. Because if you look at the underlying facts, this is not a

> case for which probation would even normally be considered. So he got the benefit of an unusual circumstance to even allow him the opportunity to be placed on probation. And he had to serve a year, and then he was placed on probation.
>
> So one would assume that [the Defendant] would appreciate how lucky he was to be able to even participate in the sex offender treatment even though he had to register and had to do all these things. I'm sure he's not unaware of the way the legislature views these things and continues to view them and that there's really no treatment that's going to be successful. It's just a matter of making sure people do not reoffend in the general public. And that's one of the things I can consider is how much coverage these things get so that it would be considered a deterrent for other individuals.
>
> There are several things about this that bother me, but the most particular one is the very specific rule that you do not go into a place that sells pornography, you don't purchase it, you don't do it. The other things might be argued as part of his treatment, that he's being honest, that he's working along. But the business with the pornography is just outright -- he said he felt bad, and his resolution to doing that was to go out and buy pornography to feel better. That is at such a high risk of things that -- you know, some people maybe when they feel bad and get under stress might eat a gallon of rocky road ice cream, but his solution is to go out and buy pornography so he can feel better, which really just makes you realize what a high risk he is.
>
> Quite honestly the Court has given him an opportunity that's rare under the circumstances. As a judge, I just cannot give him another chance. He has violated his probation, he's going to have to serve his sentence. I cannot -- given all that I've heard and looking at everything about this there is no least restrictive alternative that's appropriate for [the Defendant]. So I'm going to find that he violated his probation -- he gets all of his credit, but he's going to have to go to the Department of Corrections.

It is from this order of the trial court that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court abused its discretion when, upon determining that the Defendant had violated his probation, it ordered the Defendant to serve his entire remaining sentence in the Department of Correction. The Defendant agrees that he violated his probation, but he contends that he did so in a minor way and that the trial court abused its discretion by ordering him to serve the entire balance of his sentence in prison. When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. Tenn. Code Ann. § 40-35-311(e) (2003). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2)

order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. State v. Hunter, 1 S.W.3d 643, 644 (Tenn. 1999); Tenn. Code Ann. § 40-35-310 (2003); Tenn. Code Ann. § 40-35-311(e) (2003); Tenn. Code Ann. § 40-35- 308(c) (2003). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. Tenn. Code Ann. § 40-35-311(e). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . . ." Tenn. Code Ann. § 40-35-311(e); State v. Hunter, 1 S.W.3d 643, 646 (Tenn. 1999) (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . . ." Tenn. Code Ann. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. See State v. Duke, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

The decision to revoke probation is in the sound discretion of the trial judge. State v. Kendrick, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. Id.; State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court's finding, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. Mitchell, 810 S.W.2d at 735.

In this case, the Defendant admitted a violation of the terms of probation. This alone is substantial evidence of record to support the trial court's revocation order. See State v. Michael Emler, No. 01C01-9512-CC-00424, 1996 WL 691018, at *2 (Tenn. Crim. App., at Nashville, Nov. 27, 1996), *no Tenn. R. App. P. 11 application filed* (holding where the defendant admits violation of the terms of probation, revocation by the trial court is neither arbitrary nor capricious). We understand the Defendant's contention that he should not be made to serve his entire original sentence because he simply purchased an adult pornography magazine. In our view, after exercising a conscientious judgment as to whether or not a Defendant has violated the terms of a probated sentence, the trial court must also exercise a conscientious rather than arbitrary judgment as to an appropriate dispostion.

We conclude that the trial court did not abuse its discretion in this case. The Defendant is an admitted sex addict who molested a young child. As such, his rules of probation included a very specifically articulated requirement that he not purchase, look at, or be in possession of pornography of any kind. This rule was important to ensuring that the Defendant did not place himself in a high-risk situation that would lead to his re-offending. Despite this rule, the Defendant went to an adult bookstore because he was feeling depressed and purchased a

pornographic magazine. He then, at some point, hid the magazine in his closet. When his probation officer saw other magazines of questionable content on his bedside table, she asked the Defendant if he had any pornographic magazines. He lied to her, and said "no." She then searched his room and found the magazine in his closet. It was not until his probation officer found the magazine that he disclosed his activities to his sex offender counselor. The trial court noted that it was under unusual circumstances that the Defendant received probation in the first place and, normally, probation for his crimes would not even be considered. The trial court found that the Defendant got the benefit of an unusual circumstance, but he still violated the terms of his probation; terms that were clearly articulated and explained to him and that he understood. The trial court found that it was important to order the Defendant to incarceration to serve as a deterrent to the community and to protect the community from the Defendant. We conclude that, based upon the evidence presented, the trial court has exercised a conscientious judgment rather than an arbitrary one when it ordered the Defendant to serve the balance of his sentence in prison. Therefore, the Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

_____

ROBERT W. WEDEMEYER, JUDGE